

It would be extremely awkward for the Court to reverse itself upon a rehearing of Monday's case, since the vote was 5 to 3 and at least two Justices would have to switch to arrive at a different result.

Justice White wrote the majority opinion, joined by Chief Justice Earl Warren and Justices William J. Brennan Jr., William O. Douglas and Potter Stewart.

The dissenters were Justices Hugo L. Black, Abe Fortas and John M. Harlan. Justice Marshall, who was involved in the wiretap controversy when he was Solicitor General, did not take part.

The present situation stems from the fact that although wiretapping has been a Federal crime since 1934, all Presidents since Franklin D. Roosevelt have authorized Federal intelligence agencies to use it in "national security" investigations.

In recent years the Supreme

Court has likewise held that "bugging"—the use of microphones hidden in suspects' premises—is also illegal, under the Fourth Amendment's prohibition against unreasonable searches and seizures.

The effect has been that wiretapping and bugging has been used to gather intelligence against spies and, in some instances, against racketeers.

Under the Supreme Court's rulings, evidence or leads obtained by means of these devices was not admissible in evidence. Thus it was rarely disclosed in trials that eavesdropping had taken place, and the extent of it was not generally known.

Furor Under Johnson

However, in 1965 a number of bugs and taps by the Federal Bureau of Investigation were discovered. In the furor that resulted, President Johnson ordered an end to all

bugging and tapping except in national security investigations.

Subsequently, the Justice Department adopted a policy of disclosing in court any instance in which a defendant had been overheard over one of these illegal devices.

To date this has been done in about 40 cases, and in all but a handful the Justice Department has explained that the overhearing was accidental and that the case at issue was not affected.

Cases of Convicted Spies

To prove this, the department would furnish the trial judge a copy of the transcripts of the conversations, and he would decide for himself whether the surveillance could arguably affect the defendant's right to a fair trial.

So far, in each case in which the Government has contended that the eavesdropping did not affect a case, the judge has

agreed after seeing the transcripts that it did not.

On Monday the Supreme Court ruled on the cases of two convicted spies who had been overheard by the Government by its own admission.

They contended that they and their lawyers should be permitted to see the transcripts, and that they should not have to be satisfied with the assurance of the Government or of a Federal judge that nothing in them was arguably relevant to their trials.

Mr. Griswold insisted that the prior procedure was adequate. In any event, he urged, the Supreme Court should make a special exception for conversations that were picked up on "national security" wiretaps to prevent disclosure of Federal eavesdropping activities.

The Court ruled that any defendant who has been overheard over an illegal device should be allowed to see the

transcript, and that no exception should be made for national security taps.

Justice White's opinion said that the trial judge could order the defendant and his lawyer not to disclose the contents. However, one official explained that some defense lawyers would probably leak the contents to the press to discourage the Justice Department from bringing further prosecutions.

Unanswered Question

Monday's case did not discuss whether the Justice Department would have to make disclosures in the future if it uses the legal eavesdrop authority that was granted by Congress last June. That law permits Federal officials to eavesdrop, with court approval, in national security and in some criminal cases.

However, some experts believe that many "national security" devices will still be operated without court authori-